APPENDIX A. Existing Regulatory Framework

Introduction

This appendix identifies and analyzes the existing regulatory framework that addresses activities which threaten and cause the loss of nearshore habitat. Analysis of these regulations serves as the basis for identifying gaps in the regulatory framework in Chapter 3. A variety of statutes and regulations address activities that cause loss of nearshore habitats. The primary regulations are addressed in Chapter 3.

This appendix focuses on statutes and regulations that require permits or authorizations for activities identified as the greatest threat to nearshore habitats (see Chapter 2). These generally include activities that physically disturb and intrude into nearshore habitats. The regulatory mechanisms discussed in this appendix that address these activities are:

Federal and State
- U.S. Army Corps of Engineers Section 404 and Section 10 permit
- Aquatic Use Authorization (Aquatic Lease)
- Coastal Zone Management Certification
- Hydraulic Project Approval
- Aquaculture Permit

Local Government
- Shoreline Management Act Permit (Shoreline Permit)
- Local Planning Ordinances

Other
- Tribal Planning

Permits, statutes and regulations that are not included:

- Regulations governing hazardous, dangerous or solid waste, or toxic substances.

- Regulations governing water quality regulations (such as National Pollutant Discharge Elimination System Permit, on-site sewage system regulations, wastewater permits and stormwater rules).

- Regulations governing inland activities (such as Department of Transportation construction standards, farm plans and forest practices rules).

This appendix is organized by permit type. For each permit the following topics are addressed:

- Activities requiring permit.
- Area subject to permit.
- Statutory authority.
- Permitting process.
- Decision-making process.
- Monitoring, compliance and enforcement.
- Discussion and comment.

I. Clean Water Act

The U.S. Army Corps of Engineers (Corps) has a broad mandate that includes addressing flood control and protecting water quality and navigation of the nation's waters.

The Clean Water Act is the principal federal statute the Corps uses to meet the goal of protecting water quality. Section 404 of the Clean Water Act authorizes the Corps to issue permits for the discharge of dredged or fill material into waters of the United States.

The Rivers and Harbors Act of 1899 is the principal federal authority the Corps uses to meet the goal of protecting navigation. Section 10 authorizes the Corps to issue permits for dredging, filling and other construction in navigational waters of the U.S. These are two of the main mechanisms the federal government has to address uses that affect nearshore habitat.

Section 404 and Section 10 Permits

Statutory Authority: Clean Water Act, Section 404 and Rivers and Harbors Act of 1899, Section 10.

Activities Requiring Corps Permits

Section 404 permits are required for the filling and excavation of waters of the U.S. for the purpose of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. Section 10 permits are required for activities in, over, or affecting navigable waters for the purpose of protecting navigable waters from alteration or obstruction.

Examples of activities that require Section 404 and / or Section 10 permits include locating structures, excavating, discharging dredge and fill, construction or maintenance of piers, wharfs, dolphins, breakwaters, bulkheads, groins, jetties, mooring buoys, or boat ramps.

Nearshore Habitat Area Subject to Section 404 and Section 10 Permits

Army Corps of Engineers authority for Section 404 and Section 10 permits stops in tidal nearshore habitats at the mean higher high-water line.

Permitting and Decision-Making Processes

Applicants must submit a Section 404 and / or Section 10 permit application to the Corps. The application is then evaluated. The decision making process for Section 404 and Section 10 permits is guided by formally published regulations and policies. The Corps uses three general criteria to evaluate applications for Section 404 permits:

- The relative extent of the public and private need for the proposed structure or work.

- The extent to which the proposed activity is dependent on being located in or near the aquatic environment (the so-called "water-dependency test") and whether practicable alternative locations and methods to accomplish the objective of the proposed activity are available (practicable non-water-dependent alternatives are presumed to be available unless clearly demonstrated otherwise).

- The extent and permanence of the beneficial or detrimental effects that the proposed structure or work may have on the public and private uses to which the area is suited.

A Section 404 permit cannot be issued unless the proposed activity conforms with EPA's 404(b)1 guidelines. The fundamental premise of these guidelines is that discharges will not be allowed for non-water-dependent use that will have an unacceptable adverse impact on aquatic sites such as sanctuaries and refuges, wetlands, mudflats, vegetated shallows, riffle and pool complexes, and coral reefs. The Corps cannot grant a Section 404 permit unless the state certifies (under Section 401 of the federal Clean Water Act) that the project will not violate state standards.

A Section 10 permits is processed concurrently with a Section 404 permit. Section 10 permits do not need to meet the 404(b)(1) guidelines addressing water dependency. Also the Corps maintains that water quality certification from the state under Section 401 of the Clean Water Act is not required for Section 10 actions. The Department of Ecology, however asserts that water quality certification should be required for Section 10 permits.

Permit Exemptions

The Corps exempts certain activities from requiring a Section 404 or Section 10 permit. These include activities such as normal existing farming, forestry, and ranching activities including cultivation, soil conservation practices, farm ponds, irrigation ditches, roads used strictly for farming or forestry operations, regular maintenance, and emergency reconstruction.

Nationwide Permits

The Corps issues nationwide permits for certain activities determined to have minimal environmental impacts. Activities covered by nationwide permits that impact nearshore habitats are:

- Maintenance activities.
- Fish and wildlife harvesting, enhancement, and attraction devices and activities.
- Outfall structures.
- Structures in fleeting and anchorage areas.
- Bank stabilization.
- Minor discharges.
- 25-cubic yard dredging.
- Modifications of existing marinas.
- Single-family housing.
- Temporary construction and access.
- Maintenance dredging of existing basins.
- Boat ramps.

Nationwide permits require that the applicant submit a permit application to the Corps. The Corps will then review this application and determine whether it qualifies as a nationwide or not. The district engineer can use discretionary jurisdiction on projects, requiring an individual permit be processed for those projects determined to cause excessive impacts. One of the criteria that must be met for a nationwide to be issued is that the project must not result in "more than minimal individual or cumulative adverse environmental effect or may be contrary to the public interest." If it is "more than minimal" the application must go through individual review.

There are several conditions that must be met before a nationwide permit is determined valid for the proposed action. Several of these conditions address nearshore habitat.

Aquatic Life Movement: A condition for issuing a nationwide permit states that "no activity may substantially disrupt the movement of those species of aquatic life indigenous to the waterbody, including those species which normally migrate through the area, unless the activity's primary purpose is to impound water."

Spawning Areas: Another condition says: "discharges in spawning areas during spawning seasons must be avoided to the maximum extent practicable."

Revegetation: A third condition requires removal or destruction of shoreline vegetation to be held to the absolute minimum needed for construction. Also, immediately following construction, shorelines affected by construction "shall be replanted with native vegetation."

Individual Permits

Activities that do not qualify for a nationwide permit require that an Individual Permit be processed for the proposed activity. Individual Permit applications are widely circulated for review by the public, all interested local state and federal agencies, and the tribes. The regulations state that "full consideration will be given to the views of other agencies." In particular, all permits are subject to review of possible project impacts on fish, wildlife and water quality. The U.S. Fish and Wildlife Service, National Marine Fisheries Service, Environmental Protection Agency, the tribes, and the Washington Department of Fish and Wildlife actively recommend fish and wildlife mitigation in cases where impacts on these resources are likely, or outright permit denial in cases where these impacts cannot be acceptably mitigated.

The Corps also is required to prepare an Environmental Assessment or Environmental Impact Statement under the National Environmental Policy Act process for an Individual Permit. Among other issues, impacts on nearshore habitats are addressed. Background information is collected and analyzed about types of nearshore habitat affected and cumulative impacts of the activity. Based on information contained in the document and public and agency comment a decision is made whether the activity will be allowed or not, and if allowed, what conditions must be met.

Monitoring, Compliance and Enforcement

The Corps has a monitoring, compliance and enforcement program. Issued permits are monitored for compliance. If found in non-compliance enforcement actions are taken.

II. Hydraulics Code

The Washington Department of Fish and Wildlife's broad mandate includes all birds, mammals and fish along with all those marine, estuarine, freshwater, and terrestrial animal species not classified for human consumption. The goals of the department are to maintain highest quality habitat to ensure healthy, naturally produced fish and wildlife and to provide a range of wildlife recreation to citizens. Fish and Wildlife has a policy to achieve no-net-loss of productive capacity of the habitat of food fish and shellfish resources of the state (POL-410, 9/10/90).

The Hydraulics Code is the primary authority the department has to meet these goals of protecting habitat. The Hydraulics Code authorizes Fish and Wildlife to issue authorizations for activities that occur below the ordinary high-water line (Hydraulic Project Approval). This is one of the main mechanisms the state has to address uses that impact nearshore habitats.

Hydraulic Project Approval (HPA)

Statutory Authority: Chapter 75.20 RCW and Chapter 220-110 WAC

Activities Requiring a Hydraulic Project Approval

A Hydraulic Project Approval is required for construction and other work that uses, diverts, obstructs or changes the natural flow or bed of fresh- or saltwaters of the state for the purpose of providing protection for all fish life (WAC 220-110-010). Protecting fish life means preventing loss or injury to fish or shellfish and protecting habitat that supports fish and shellfish populations (WAC 220-110-020(33)).

Examples of activities that require HPA include piers, docks, pile driving, dredging, gravel removal, placement of outfall structures, bulkheads, fills, boat launches, floats and marinas.

Nearshore Habitat Area Subject to Hydraulic Project Approval

The jurisdiction of Fish and Wildlife stops at the ordinary high-water line but the agency is often involved in reviewing projects above ordinary high-water because the construction equipment is below ordinary high-water.

Permitting and Decision- Making Processes

Applicants must submit an HPA application to Fish and Wildlife. A habitat biologist evaluates the application. The Hydraulic Code rules (WAC 220-110) contain technical provisions applicable to different types of construction or maintenance projects that must be met for approval. The provisions reflect best available science and practices. Additional site-specific conditions may be attached to the HPA during individual review of the application.

Technical provisions are included in the regulations for bulkheads and bank protection, boat ramps and launches, piers, pilings, docks, floats, rafts, ramps, boathouses, houseboats, and associated moorings, utility lines, dredging, and marinas. General provisions that apply to all projects are also included (WAC 220-110-270 -330).

Technical provisions address topics such as construction methods, design, vegetation removal, stockpiling of material, placement of material, and location of projects in relation to tidal habitats and high-water line.

The regulations identify habitats of special concern (surf smelt, pacific sand lance, rock sole, pacific herring, rockfish, lingcod, juvenile salmon, eelgrass, kelp and intertidal wet-

land vascular plants). Also included are timing restrictions to protect spawning beds of surf smelt and herring, and migration, feeding and rearing areas for salmon (WAC 220-110-250 and 271).

Some sections of the regulations also specifically state that mitigation measures must ensure no-net-loss. For example, no-net-loss for bulkheads and bank protection for non-single family residences is required to protect productive capacity of fish and shellfish habitat (WAC 220-110-280).

A hydraulic project will be denied if the project will result in direct or indirect harm to fish life unless adequate mitigation can be assured by conditioning the approval or altering the proposal (WAC 220-10-030(12). Protection of fish life shall be the only grounds upon which an HPA permit may be denied (WAC 220-110-030(13).

The HPA program is linked to the U.S. Army Corps of Engineers Section 404 (of the federal Clean Water Act) and Section 10 (of the Rivers and Harbors Act) permit process. The Corps public notice is accepted by Fish and Wildlife as an application for an HPA. A separate HPA application is required for activities not requiring a Corps permit. The Corps will not, by policy, issue a permit for any action that has been denied an HPA (33CFR Part 320). The Hydraulics Code states that permits must be processed within 45 days. If denied, reasons for denial will be stated in writing. Under the rules, Fish and Wildlife will process permits within 30 days, except in specific instances laid out in the code.

Monitoring, Compliance and Enforcement.

Fish and Wildlife has a monitoring, compliance and enforcement program. Issued approvals are monitored for compliance. If found in non-compliance, enforcement actions are taken. Any person failing to comply with any of the requirements or provisions of an HPA is guilty of a gross misdemeanor. Additionally, Fish and Wildlilfe may impose a civil penalty of up to $100 per day for a violation or continuing violation (WAC 220-110-360).

III. The Shoreline Management Act

The 1971 Washington State Legislature realized that shorelines of the state are among the most valuable and fragile of its natural resources, that unrestricted piecemeal construction on shorelines posed a significant threat to shorelines, and that this piecemeal construction was not in the best public interest. In response, they passed the Shoreline Management Act (RCW 90.58.020).

The Shoreline Management Act establishes a process for coordinated planning to protect the public interest associated with the shorelines of the state while at the same time recognizing and protecting private property rights.

The act establishes policy direction and a structure for managing shorelines. It states that shorelines should be managed to foster all reasonable and appropriate uses, provide

the public the opportunity to enjoy the physical and aesthetic qualities of natural shorelines, and to ensure uses are designed and conducted in a manner to minimize damage to the ecology and environment of the shoreline area and any interference with the public's use of the water. The act directs the Department of Ecology and local governments to implement this policy.

Statutory Authority: Chapter 90.58 RCW and Chapter 173-16 through 173-27 WAC.

Area Subject to Shoreline Management Act

All nearshore areas fall under the jurisdiction of the Shoreline Management Act. The geographic definition of the act's jurisdiction is set forth in RCW 90.58.030(2)(c, d and f).

The Department of Ecology

The Shoreline Management Act directs the Department of Ecology to serve in a support and review capacity to assist and insure that local governments implement the act. Ecology wrote regulations to implement the Shoreline Management Act (Chapter 173-16 through 173-27 WAC). The regulations include requirements local governments must meet to implement the act. The department also produced a guidebook for local governments that identifies the organization and content that should be included in a Shoreline Master Program.

Local Governments

The Shoreline Management Act assigned local government the primary responsibility for implementing policy in the act through development of a regulatory program for shorelines. Each Puget Sound city and county with shoreline adopted shoreline master programs to serve as guides for regulating the use of shorelines consistent with the goals and policies included in the Shoreline Management Act and the regulations developed by Ecology. A local government has some discretion to determine the specific policies and regulations they include in a shoreline master program, as long as those policies and regulations are consistent with the Shoreline Management Act and the regulations.

Policies and Regulations

Shoreline master programs place shoreline areas into different designations. Each designation includes policies and regulations that define how activities will be managed within that designated area. The designations that usually provide the most protection for nearshore habitats are "natural", "conservancy" and "aquatic." Other designations that allow more intensive development include "rural" and "urban." Shoreline management programs usually include a matrix that lists activities and identifies whether the activity is outright prohibited, a conditional use, or an allowed use within each designation.

Shoreline master programs include policies and guidelines that apply to a specific use or activity. Uses and activities that affect nearshore habitat and are addressed in shoreline

master programs can include aquaculture, mining, commercial development, industrial development, recreation, marinas, and shoreline modifications such as dredging, landfills, piers and bulkheads.

All activities occurring in shoreline areas are subject to and must be consistent with policies and regulations in a shoreline master program.

Substantial Development Permit

A Substantial Development Permit is required for activities that consist of construction or exterior alteration of structures, dredging, drilling, dumping, filling, removal of any sand and gravel, bulkheading, driving of piling, or that interfere with the normal public use of the surface of waters.

Many projects are exempt from the requirement to obtain a Substantial Development Permit. The exemptions are set forth in RCW 90.58.030(3)(e), 90.58.355 and 90.58.515. These exemptions are also defined in WAC 173-27-040 and read as follows:

- Developments having a fair market value less than $2,500.
- Maintenance and repair of existing structures.
- Construction of single-family bulkheads.
- Construction of single-family residences.

Activities requiring a Substantial Development Permit must go through a process that includes public and agency review. Comments collected during review must be considered in decisions regarding issuance of a permit.

Conditional Use Permit

Shoreline master programs identify specific activities as "conditional uses." Conditional uses require a Conditional Use Permit. Although an activity may be exempt from needing a Substantial Development Permit, it might still require a Conditional Use Permit if identified in the program as requiring one.

Conditional Use Permits are issued only if several criteria can be met. One of the criteria is that the proposed use will cause no significant adverse effects to the shoreline environment in which it is to be located (WAC 173-27-070 (1)(d)).

Also, in considering whether to grant a Conditional Use Permit, consideration "shall be given to cumulative impact of additional requests for like actions in the area. For example, if conditional use permits were granted for other developments in the area where similar circumstances exist, the total of the conditional uses shall also remain consistent with the policies of RCW 90.58.020 (Shoreline Management Act) and shall not produce substantial adverse effects to the shoreline environment (WAC 173-27-070(2))."

Variance Permit

A Variance Permit is designed to grant relief to an applicant when policies and regulations included in a shoreline master program cause "unnecessary hardship" (WAC 173-27-170). This may occur when the physical character or configuration of property is such that the strict implementation of a policy is very difficult. One of the considerations in granting a variance is whether the cumulative impact of additional requests for like actions in the area will remain consistent with the policies of the Shoreline Management Act (WAC 173-27-180 (4)).

State Environmental Policy Act

Permits issued under Shoreline Management Act are subject to the State Environmental Policy Act. A proposed activity's potential affect on nearshore habitats is analyzed during review under the State Environmental Policy Act.

Final Decisions

Local governments can include conditions on any permits to make the activity consistent with program policies and regulations. After making a decision to approve or deny a shoreline permit, local governments send the decision to the Department of Ecology. For conditional use permits and variance permits, Ecology may approve, approve with conditions, or deny the permit. Ecology has no ability to approve or deny substantial development permits, but all shoreline permits are reviewed for consistency with the Shoreline Management Act and the local shoreline master program.

Appeals

The Shoreline Management Act sets forth a process for appealing a permit that can be used by citizens, citizen groups, and government agencies (including the Department of Ecology). Appeals are heard by the Shorelines Hearings Board, a six-member, quasi-judicial body appointed by the Governor. The Shorelines Hearings Board provides an important mechanism for independent permit review without court action.

Monitoring, Compliance and Enforcement

The Department of Ecology and local governments have programs for monitoring, compliance, and enforcement. Issued permits are monitored for compliance. Any person failing to comply with any of the provisions of a shoreline master program may be found guilty of a gross misdemeanor. This can be punished by a fine of not less that $100 nor more than $1,000 or by imprisonment in a county jail for not more than 90 days for each

offense. Additionally, the local government, and or the Department of Ecology may impose a civil penalty of up to $1,000 per day for a violation.

IV. The State Environmental Policy Act

The Washington State Legislature in 1971 passed the Washington State Environmental Policy Act. The act is designed to encourage harmony between people and their environment and eliminate damage to the environment and the biosphere (RCW 43.21C.010). The act establishes policy for the state of Washington and directs agencies to use all practicable means and measures to create and maintain conditions under which people and nature can exist in productive harmony [RCW 43.21C.020(1)(b)] and to maintain wherever possible an environment which supports diversity and a variety of individual choice [RCW 43.21C.020(2)(e)].

The act establishes a process to meet these goals. The process requires agencies to analyze the environmental impacts of proposed projects. This analysis is intended to coordinate with permit reviews, including those required for activities in nearshore habitats such as a hydraulic project approval. The process helps decision makers at all levels of state and local government make better environmental decisions. The State Environmental Policy Act process is one of the main tools available to local governments and other agencies for evaluating impacts of projects on nearshore habitats.

Statutory Authority: Chapter 43.21C RCW and Chapter 197-11 WAC.

Area Subject to State Environmental Policy Act

The area subject to the State Environmental Policy Act includes all land within county and city boundaries. All nearshore habitat falls within this area.

Exemptions

A variety of proposed actions are categorically exempt from the State Environmental Policy Act process and are not subject to its requirements. Categorical exemptions include (WAC 197-11-800):

- Construction or location of any residential structures of four dwelling units.
- Any landfill or excavation of 100 cubic yards.
- Grading, excavating, filling, septic tank installations and landscaping necessary for exempt facilities.
- Repair, remodeling, maintenance or minor alteration of existing public structures, facilities or equipment on land not covered by water.

• Minor repair or replacement of structures on lands covered by water such as repair or replacement of piling, ramps, floats or mooring buoys, or minor repair, alteration or maintenance of docks.

The State Environmental Policy Act Process

The process starts when a permit application land-use plan or program is submitted to an agency. A lead agency is identified. The lead agency may be a city, county, state agency or other special district, such as a port. For most private projects, the lead agency is the city or county requiring permits. The lead agency makes sure that all requirements of the State Environmental Policy Act are met.

The agency asks the applicant to fill out an "environmental checklist." This checklist asks questions about how the project will affect different aspects of the environment. The checklist includes questions about the following (WAC 197-11-960):

- Description of site.
- Approximate percent slope.
- Type of soils.
- Signs of instability.
- Possibility of erosion due to clearing, proposed measures to control erosion amount of fill and dredge.
- Discharge of waste material.
- Source of runoff including method of collection and disposal.
- Type of vegetation.
- Type and amount of vegetation that will be removed or altered.
- Proposed landscaping, use of native plants.
- Birds and animals present at site.
- Proposed measures to preserve of enhance wildlife.

The checklist is designed to assist the lead agency in determining whether the proposal would likely have a significant adverse environmental impact. Significant means a reasonable likelihood of more than a moderate adverse impact on environmental quality. Significance involves context and intensity and may vary from one physical setting to another. It also involves the intensity of an impact in terms of magnitude and duration, and the likelihood of its occurrence (WAC 197-11-794). The lead agency decides whether or not a project's impact is significant.

If the project is determined not to have significant environmental impacts, the agency will issue a determination of non-significance. This documents the agency's decision that, in its opinion, the project will not have significant adverse environmental impacts. Most projects receive a determination of non-significance.

If the project is determined to have a probable significant adverse impact an environmental impact statement is required.

Environmental Impact Statement

An environmental impact statement is a document that describes the proposal, alternatives to the proposal, existing environmental conditions, adverse environmental impacts that may be caused by the project, and mitigation measures that may prevent or lessen probable adverse impacts (WAC 197-11-440).

The elements of the environment that an environmental impact statement must address when include (WAC 197-11-444):

- Erosion.
- Water.
- Surface water movement, quantity and quality.
- Runoff and absorption.
- Plants and animals.
- Habitat for and numbers or diversity of species of plants, fish or other wildlife.
- Unique species.
- Fish or wildlife migration routes.
- Land and shoreline uses.
- Water and stormwater.
- Sewer/solid waste.

The scope of the environmental impact statement must include an analysis of direct, indirect, and cumulative impacts (WAC 197-11-792).

Writing an environmental impact statement is the lead agency's responsibility, but proponents of a proposal often participate in its preparation. The lead agency lets other agencies and the public know when an environmental impact statement is required and asks for suggestions regarding its content. A draft statement is prepared and distributed to agencies with jurisdiction and other interested parties for review and comment. A public hearing is held on the draft environmental impact statement. Responses to public and agency comments are developed and a final environmental impact statement issued.

An agency may deny permits or other approvals under the State Environmental Policy Act if the proposal would be likely to result in significant adverse environmental impacts and if mitigation measures would be insufficient to mitigate the identified impact. The rules of the act emphasize the identification of mitigation measures that may be required as

permit conditions to avoid or reduce environmental impacts to shoreline areas and other environmental resources.

The consistency of a proposal with existing plans and policies, such as shoreline master programs, comprehensive plans, zoning and local sensitive areas ordinances, may be evaluated as part of the State Environmental Policy Act's review process (either in the environmental impact statement or the determination of non-significance) and permit review process.

Completion of the State Environmental Policy Act's process is usually done before or in conjunction with agency decisions on a Hydraulic Project Approval, shoreline Substantial Development Permit, and any other local and state permit or approval.

V. 1995 Changes to the SEPA, SMA, and GMA

A state law passed in 1995, referred to by its bill number ESHB 1724, changed state laws governing Shoreline Management Act, State Environmental Policy Act and Growth Management Act. The changes better enable citizens and developers to know what to expect from the local permit process and were designed to make planning work better and make permitting easier. Although the law changes some of the procedural requirements of each of the acts and how they relate to one another, the changes did not alter the basic goals or structure and framework of the permitting process. The tools available to address impacts to nearshore habitats are still in place under the acts.

VI. Aquatic Lands Act and Department of Natural Resources

Puget Sound encompasses approximately 1,300 miles of tidelands (land below ordinary high tide and above extreme low tide). Between 500 to 900 miles of these tidelands are owned by the state. This comprises approximately 20-40 percent of all tidelands in the Sound. Tidelands not in state ownership are owned by private individuals, cities, tribes or other governmental entities.

The Washington State Legislature in 1982 acknowledged that state-owned tidelands are a finite natural resource of great value and an irreplaceable public heritage and that these lands are faced with conflicting demands for use (RCW 79.90.450). In response, the legislature passed the Aquatic Lands Act, identifying a management philosophy and framework for managing these lands.

The act states that aquatic lands are to be used to provide a balance of public benefits for all citizens of the state. The public benefits identified in the act include encouraging direct public use and access, fostering water-dependent uses of aquatic lands, ensuring environmental protection, and using renewable resources (RCW 79.90.455).

The Department of Natural Resources manages tidelands consistent with the direction provided in the act. The Aquatic Lands Act is one of the primary pieces of legislation used by Natural Resources when making management decisions about these tidelands. It is also

one of the primary tools available for protecting those nearshore habitats owned by the state.

Statutory Authority: Chapter 79.90 through 79.92 RCW and Chapter 332-30 WAC.

Area Subject to Aquatic Lands Act

The area subject to the Aquatic Lands Act encompasses all state-owned tidelands, shorelands, harbor areas and beds of navigable waters. Tidelands are defined as land below ordinary high tide and above extreme low tide.

Activities Requiring Authorization by the Department of Natural Resources

Any activity that interferes with the use by the general public of an area requires authorization from Natural Resources by way of sale, agreement, lease, permit or other instrument (WAC 332-30-122). The department sells material from tidelands such as rock, gravel, and sand. Natural Resources requires a lease of permit for other activities, including marinas, moorage, piers, booming, rafting and storage of logs, swim rafts, mooring buoys, marine aquatic plant removal, commercial clam harvesting and aquaculture, dredge disposal, and easements for utility crossings.

Lands of Statewide Significance

Natural Resources focuses management of tidelands on protecting areas with statewide significance. This includes areas whose use, management or intrinsic nature have statewide implications and provide major statewide public benefits. For example, high-quality beaches for public use and aquatic lands fronting state parks are of statewide value for public use and access. Commercial clam and geoduck beds and sites uniquely suited to aquaculture are of statewide value for renewable resource use. Harbor areas are of statewide value for water-dependent navigation and commerce. Certain aquatic land habitats and plant and animal populations are of statewide value for recreational and commercial fisheries, wildlife protection, and scientific study [WAC 332-30-106 (66)].

Planning

Natural Resources identifies lands with significant values and tries to prevent conflicts and mitigate adverse effects of proposed activities. The primary means used by the department to identify significant tidelands is through the Shoreline Management Act. Natural Resources identifies tideland areas of particular statewide value, informs appropriate shoreline planning bodies of the location and value of the lands identified, participates in shoreline planning, and suggests ways to balance statewide values in shoreline master programs.

The department may supplement the planning process of a shoreline master program with management plans. This is done when Natural Resources' constitutional and statutory proprietary responsibilities for state-owned aquatic lands are not provided for by a shoreline master program.

Lease and Permit Process

Activities on state-owned tidelands must receive authorization from the Department of Natural Resources and an application must be submitted for review by the deparment. Natural Resources requires that structures and activities are properly designed, constructed and maintained. It also requires that activities are conducted in accordance with sound environmental practices and comply with applicable environmental laws and regulations, and that appropriate steps are taken to mitigate substantial or irreversible damage to the environment.

The department relies heavily on other agencies to ensure that the environment is protected. Natural resources of statewide value are protected through existing state and federal environmental protection programs including the state Shoreline Management Act, State Environmental Policy Act, Hydraulics Project Approval, and Section 10 of the Rivers and Harbors Act. Natural Resources relies on these programs and other governmental agencies for their expertise to evaluate environmental impacts to projects and to incorporate appropriate protective measures in their respective project authorizations.

If no plan to mitigate impacts exists or an authorization from another agency is inadequate, Natural Resources will mitigate unacceptable adverse impacts on a case-by-case basis by the following methods, listed in order of preference (332-30-107 WAC):

- Alternatives will be sought which will avoid all adverse impacts.
- When avoidance is not practical, alternatives shall be sought which cause insignificant adverse impacts.
- Impacted resources of statewide value shall be replaced.
- The value can not be replaced, payment for the loss is required.

Harbor Line Commission

This commission establishes harbor areas for three primary reasons: 1) to reserve areas for navigation and commerce needs; 2) to maintain state control of harbor areas; and 3) to limit how much water surface may be encumbered by structures and associated moorage.

Aquatic Resources

The Department of Natural Resources manages a significant portion of Washington's aquatic plant resources located on state-owned lands. These include:

- All subtidal aquatic plant communities (seaweeds, seagrass).
- More than 40 percent of intertidal plant communities (seaweeds, seagrass).
- Freshwater plants living on the beds and shorelands of 70 percent of navigable rivers and lakes.

Oysters, clams, mussels, scallops, shrimp and other species on state-owned aquatic lands are managed by Natural Resources. The department's stewardship role also includes protecting aquatic habitat values, such as healthy tidelands and bedlands and good water quality. Valuable materials are part of the state's ownership of aquatic land, and are defined as any product or material within or upon aquatic lands, such as stone, gravel and sand. Petroleum and gas reserves located below state-owned aquatic lands also belong to the state.

VII. Growth Management Act

The Washington State Legislature in 1990 found that uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in conserving and wisely using land in the state threatened the environment, sustainable economic development, and the health, safety and high quality of life enjoyed by residents. In response, the legislature passed the Growth Management Act (Chapter 36.70A RCW).

The Growth Management Act establishes a process for citizens, communities, local governments and the private sector to cooperate and coordinate with one another in comprehensive land-use planning.

The act establishes the goals and policy direction on a wide range of issues (RCW 36.70A.020). It includes issues that address sprawl, urban growth, affordable housing, economic development, open space and recreation, regional transportation, property rights, natural resource industries, historic lands and buildings, permit processing, public facilities and services, early and continuous public participation, and environmental protection and shoreline management. The Growth Management Act directs counties and cities to implement the policy direction included in the act.

Statutory Authority: Chapter 36.70A RCW and Chapters 365-190 and 365-195 WAC.

Area Subject to Growth Management Act

The area subject to the Growth Management Act includes all land within county and city boundaries. All nearshore habitats fall within this area.

Designations

Counties and cities are directed to implement and develop mechanisms to meet the goals identified in the Growth Management Act. One of the main mechanisms used by counties, and required by the act, is to identify and designate land into different categories. For each category, a set of development regulations applies.

Counties identify and designate urban growth areas, resource lands (forest, agriculture and mineral), and critical areas (wetlands, aquifer recharge areas, frequently flooded areas, geologically hazardous areas, and fish and wildlife habitat conservation areas) (RCW 36.70A.030). These areas, and the regulations that apply to them, are included in a comprehensive plan. The designations that relate most directly to nearshore habitat are geologically hazardous areas and fish and wildlife habitat conservation areas.

The requirement to identify geologically hazardous areas and critical areas for fish and wildlife conservation provides a mechanism for counties to regulate activities that can negatively affect nearshore habitat areas.

Geologically hazardous areas are those locations that, because of susceptibility to erosion, sliding, earthquake or other geological events, are not suited to the siting of commercial, residential or industrial development consistent with public health and safety concerns (RCW 36.70A.030). Counties can prohibit development, or impose restrictions such as setbacks in these areas.

Restrictions can also be included in fish and wildlife conservation areas. Fish and wildlife conservation areas can include areas with endangered, threatened and sensitive species; habitats and species of local importance; commercial and recreational shellfish areas; kelp and eelgrass beds; and herring and smelt spawning areas [WAC 365-190-080 (5)].

"Habitats and species of local importance" can include a seasonal range or habitat element with which a given species has a primary association, and which, if altered, may reduce the likelihood that the species will maintain and reproduce over the long term. These might include areas of high relative density or species richness, breeding habitat, winter range and movement corridors. They might also include habitats that are of limited availability or high vulnerability to alteration such as cliff, talus and wetlands [WAC 365-190-030(9)].

Permits

Critical areas designations include regulations for managing activities in these areas. Most counties have adopted development regulations that require permits for activities in or near critical areas.

The permit process that counties have adopted through their development regulations to protect critical areas vary from jurisdiction to jurisdiction. Most of them however re-

quire that an applicant provide sufficient information regarding his or her proposal, any impacts on resource values and any proposed mitigation. Local government then use this information to determine whether the proposed activity complies with specific protection standards.

VIII. The Endangered Species Act

A review of the Endangered Species Act was included in the 1990 report Protecting Fish and Wildlife Habitat in Puget Sound (PSWQA, 1990). The report's analysis concluded that the the act's emphasis was on protecting individual species rather than communities or ecosystems. Also, not all species are equally protected because more is known about birds and mammals than invertebrates. Nearly 70 percent of the species listed were birds and mammals. Most species recovery programs are underfunded and behind schedule.

More recently, however, two salmon species in Puget Sound were proposed for listing under the Act. Such listings may serve to bring more of a focus on the importance of nearshore habitats to juvenile salmon. If chinook and / or chum are listed, alterations of nearshore habitat may be restricted. National Marine Fisheries Service (NMFS) has proposed designating marine hearshore habitat in Puget Sound as critical habitat for chinook.